In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 250

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE BABCOCK & WILCOX COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, THE BABCOCK & WILCOX COMPANY

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I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 222 F. 2d 316. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 109 N. L. R. B. 485 and appear in the record herein filed. (R. 50-82.) The order of the Board is attached as "Appendix A," infra pp. 49-50.

II.

JURISDICTION

Jurisdictional requisites are stated in Petitioner's brief. However, Respondent suggests that the questions presented by the Petitioner are not the questions determined in this case by the Board and the United States Court of Appeals for the Fifth Circuit.

III.

QUESTIONS PRESENTED

1. Whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act by non-discriminatorily enforcing against non-employee union organizers its rule against strangers entering upon its private property to distribute literature?

2. Whether the National Labor Relations Board can order an employer to cease and desist from an action subject to reasonable regulations, without defining "reasonable regulations," and then in the broad language of Section 7 and 8(a)(1) of the National Labor Relations Act, restrain an employer from engaging in any conduct like or related to the one isolated act found to constitute an unfair labor practice?

IV.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.), and the text of the *Fifth Amendment to the United States*

Constitution are set forth in "Appendix B" (infra), pp. 51-53.

V.

STATEMENT

A.

The Facts

The Respondent, a manufacturer of boilers and other allied products, has a plant at Paris, Texas, which is a part of its Boiler Manufacturing Division. The United Steelworkers of America, C. I. O., hereinafter called "Union," filed a charge against Respondent involving its Paris plant and the National Labor Relations Board issued a complaint on such charge. The complaint alleged that Respondent had engaged in various unfair labor practices, about 15 in number, one of which being that it had denied the union access to its property for the purpose of soliciting union adherence or membership. (R., 12-21.) After a hearing, the Board found that there was no merit to any of the allegations contained in the complaint other than that which alleged that Respondent had denied the union access to its property for the purpose of soliciting union adherence or membership. (R. 18.) As a result, all the allegations of unfair labor practices made against Respondent were dismissed, save and except only the allegation that Respondent had denied non-employee union organizers access to its property, which Respondent admitted. The Board found that such denial by Respondent constituted a violation of the Act.

The Paris plant is located about 1 mile from the city limits of Paris, Texas, which town has a population of about 21,000 people. (R. 66.) At this location, Respondent owns about 100 acres of land situated on the West side of a Farm to Market Road, the right of way of which is 80 feet wide with a paved portion of 18 feet, leaving 31 feet on each side unpaved and unused.

About 40% of Respondent's approximately 500 employees live in the City of Paris, Texas. 75% of its employees live in Lamar County, Texas. Those employees who live outside the City of Paris, live an average distance of 10 to 12 miles from the Paris plant. (R. 67-68; 215-216.)

About 60% of Respondent's employees have telephones at their homes and about 90% of those phones are on one exchange, that being the Paris telephone exchange. (R. 214-215.)

From the point where Respondent's driveway intersects the Farm to Market Road, it is ¾ of a mile to the first cross-roads on the North, and 2 or 3 miles to the first cross-roads on the South. (R. 247-248.) Respondent owns no other property in the entire area, including that across the Farm to Market Road and that along the Farm to Market Road to the North and South of its property. (R. 214-215.)

Respondent began production at its Paris plant in March of 1953 and immediately put into effect a no-distribution rule, barring distribution of literature of all kinds and nature upon its property by all strangers to the plant. (R.

189.) It was affirmatively found by the Board that Respondent's rule was non-discriminatorily adopted and non-discriminatorily enforced. (R. 71.)

Respondent's employees are not represented by any labor organization as their bargaining agent and no labor organization has at any time contended that it represented its employees as their bargaining agent. During the summer of 1953, representatives of the union which filed the charge against Respondent made an organizational effort at Respondent's plant, and on three occasions distributed union literature to employees traveling across the vacant unpaved strip between Respondent's property and the paved portion of the road. On June 15, 1953, union organizers distributed 300 pieces of union literature to some 325 employees as they were driving into and out of Respondent's driveway; again on June 30, 1953, they distributed at least 195 pieces of union literature to 250 employees at the same place and on the same strip; and then on July 13, 1953, at the same place off Respondent's property distributed over 225 pieces of union literature to 250 employees as they were leaving work. (R. 69, 245-246.) These three occasions were the only times the union representatives attempted to distribute literature to Respondent's employees in the vicinity of Respondent's plant. (R. 69, 179-181, 185.)

During the summer of 1953 the union representatives mailed literature to approximately 100 of Respondent's employees on each of three different occasions. (R. 71-72.) During this same time, the union representatives com-

municated with many of Respondent's employees by talking with them on the streets of Paris, by driving to their homes and talking with them there, and by talking with them over the telephone, all for the purpose of soliciting their adherence and membership in the union. (R. 71-72.) The record is silent on any attempt by the union to communicate with Respondent's employees through the use of newspapers, radio, civic organizations, public meeting places, outdoor billboards, and other services and facilities afforded by a town the size of Paris, Texas, and the area in which the employees resided.

Nevertheless, on October 28, 1954, the union wrote Respondent requesting permission for its representatives to distribute union information in leaflet form to Respondent's employees on Respondent's parking lot or on its plant property. (R. 219-220.)

Respondent denied this request as it had denied previous similar requests by all other strangers such as local commercial establishments, civic organizations, lodges and churches. (R. 185, 215.)

B.

The Board's Conclusions and Order

The statement of the Petitioner with respect to the Board's conclusions and order are misleading. In actuality, the Board gives to non-employee union organizers the same rights and privileges to use an employer's property for the purpose of distributing union literature that employees

are accorded. The Board achieves this by concluding that non-employee union organizers have a right to distribute union literature on an employer's parking lot, driveways and walkways, though the union does not represent the employees as their bargaining agent. This conclusion of the Board is premised only by the finding that the right of way between the "blacktop" and Respondent's drive is neither a safe nor a practicable place for the union organizers to distribute their literature (R. 75), and the further conclusion that the non-employee union organizers could not "readily" distribute their literature away from Respondent's premises (R. 75).

After reaching the above conclusion, the Board entered an order requiring Respondent to cease and desist from prohibiting distribution of union literature on its parking lot, walkways and drive, subject to reasonable regulations that Respondent may impose. The order further, in the language of the National Labor Relations Act (hereinafter referred to as the Act), requires Respondent to cease and desist from engaging in any like or related acts. (R. 53-54.)

C.

The Decision of the Court Below

The Petitioner sets forth a brief analysis of the decision of the court below which is substantially correct. However, the court below clearly recognized the question which was

and is involved in this case and stated it precisely in the following language:

> "This question is, whether on a record devoid of proof that any employees were disciplined or in any manner discriminatorily dealt with by the respondent, or were or desired to be members of the union, or were in any way connected with or interested in the distribution by the union representatives of its literature, the Board had authority to require the Respondent to institute in favor of non-employee union organizers, complete strangers to it and to its employees, a discriminatory non-enforcement of its non-distribution rule, which the proof showed and Examiner and Board found had always and uniformly been enforced in a completely non-discriminatory way." (R. 251.)

VI.

SUMMARY OF ARGUMENT

Petitioner would have this court think that this is a re-argument of the *LeTourneau* case, in which this court held that the Board could properly order an employer, in the absence of any showing by him that to do so would create production and disciplinary problems, to cease and desist from enforcing against his employees a rule prohibiting their distributing union organizational literature on the employer's parking lot. The case now before this court, however, is not the *LeTourneau* case all over again. It is an entirely different case. Here the employer's rule before the Board was a non-discriminatory prohibition against strangers coming on its privately owned property to distribute literature of any kind.

LèTourneau involved the right of employees to distribute literature on the parking lot. As employees they had been licensed to enter the employer's property and use its parking lot and they were given free time on the property which the Act, subject to reasonable rules and regulations, permits them to use for self organizational purposes. There it was perhaps proper to balance against the self-organizational rights of the employees the disciplinary and production problems which might be created if the employees were to pursue this right by the distribution of literature. There too, it is proper that the burden to show production or disciplinary problems shall fairly lay on the employer, who, after all, best knows them.

Here, however, the rule in question is directed not against employees but against strangers. The balance is not between the interests of the licensor and those of the licensee. It is rather between the rights of the property owner and those of the unlicensed stranger. It is improper (here, as the Board has done) to apply the same tests to the right of the stranger as to the right of the licensed employee. This, the Board has done. Rather than the burden being on the property owner to show that disciplinary or production problems would be created if the stranger were allowed on his property, the burden should be on the stranger to show insuperable hardship to the employees' self-organizational rights before he is entitled to break down the property owner's traditional privilege to allow whom he pleases on his property. No insuperable hardship in the distribution of union literature off the employer's premises, or in the exercise of self-organizational rights on

the part of the employees, or to the union assisting the employees in the exercise of their rights, was shown in this case; none exists. If such were true, the union and union representatives, not the employer, would be in a position to and must make proof thereof.

Petitioner has erred in seeking to apply the tests of the *LeTourneau* case to the entirely different case presented when a non-employee seeks to violate a non-discriminatory no-distribution rule. Respondent suggests that the Fifth Circuit in the instant case, the Seventh Circuit in the *Marshall Field* case, the Ninth Circuit in the *Monsanto* case, and the Tenth Circuit in the *Seamprufe* case, have properly held that, before he can break down another's property rights, the stranger must show much more than, as is all the Board has shown here, that it would be more convenient to distribute literature on the employer's premises, than to approach the employees elsewhere.[1] Rather he must show either that the employer has permitted another stranger to distribute literature on his property and is discriminatorily preventing the union organizer from doing so in order to discourage membership in the union, or that, as is the case with an isolated lumber camp or a company town, an insuperable hardship to approaching the employees exists if the organizer is not permitted upon employer property.

[1]Petitioner in its statement of the case presented herein terms it "unreasonably difficult" for a union to reach the employees off company property it it is more convenient for the union to reach them on it. This characterization begs the issue presented by this case, viz: Is reaching the employees off company premises here so difficult that the employee's self-organizational rights are prejudiced to the point that the property owner may be required to relax his uniform no distribution rule in favor of a stranger union organizer?

Petitioner has failed to meet this burden, and the order of the court below should therefore be affirmed.[2]

VII.

ARGUMENT

A.

First Question

The court below properly denied enforcement of the Board's order requiring Respondent to rescind a non-discriminatorily adopted and non-discriminatorily enforced no-distribution rule insofar as it applied to non-employee union organizers who sought to distribute union literature upon Respondent's property, because such order is contrary to law.

1.

Real Purpose of Board's Order

It clearly appears that the real purpose and intent of the order of the Board is to require the employer to furnish non-employee union organizers an arena upon which they can contact and *discuss* with employees the matter of the union representing the employees as their bargaining agent. This real purpose is quite clearly brought out in the Petitioner's brief by the following statement:

> "And distribution through the mails, if not equally costly and time consuming, it at any rate a poor substitute for personal contact, *affording no opportunity*

[2]The denial of enforcement by the Court below should be affirmed for the additional reason that the Board's order is too broad, vague and indefinite to authorize enforcement.

*for the distributor to answe. the questions which the literature is bound to evoke."** (Petitioner's Brief, page 40.)

This purpose of the order is further illustrated by the argument of the Petitioner to the effect that present day labor unions are increasingly selecting trained and professional organizers, trained at the union's own special schools, such as salesmanship schools, and that the Employer is required to give such professional union organizers every opportunity to contact the employees. (Petitioner's Brief, pp. 29-30.) Thus, the Board, in actuality, is extending the holding in the case of *Bonwit Teller v. National Labor Relations Board, 197 F. 2d 640 (C. A.-2)*, which holding was specifically renounced and rejected by the Board in the case of *Livingston Shirt Corporation, 107 N. L. R. B. 400 (1953)*, in the following language:

> *"We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting, as was done in Bonwit Teller, to make the facilities of the one available to the other.*"*
>
> "It will be seen from our dissenting colleague's recitation of the history of *Bonwit Teller* that it stemed from the captive audience concept of *Clark Brothers, 70 N. L. R. B. 802.* In that case the majority of the Board found that it was an unfair labor practice for an employer to make a non-coercive speech to employees on its own premises during working hours. This doctrine was short lived. Congress specifically repudiated it, and said so, when it enacted Section 8

*Emphasis added.

(c) of the Act. The concept was not so easily laid to rest for the Board soon devised the *Bonwit Teller* doctrine. *This latter case held that, while the speech was protected by 8 (c) an employer who made a privileged speech was guilty of an unfair labor practice if he denied a request by the union to reply on his time and property. It requires little analysis to perceive that Bonwit Teller was the discredited Clark Brothers doctrine in scant disguise. It is equally contrary to the statute and congressional purpose."**

However, in the instant case, the Board seeks to go even beyond the holding in *Bonwit Teller*. Here the employer has not been making anti-union talks, or distributing anti-union literature, as was the employer in *Bonwit Teller*. Respondent agrees that the holding in *Bonwit Teller* was and is contrary to the Act and Congressional purpose and submits that the result here sought to be achieved by the Board, i.e., requiring the employer to furnish the union a forum for its discussions and distribution of literature, when the employer is engaging in no anti-union campaign, is all the more contrary to the Act and Congressional purpose.

2.

Unions Have No Inherent Right to Distribute Union Literature in the Manner Quickest, Most Convenient and Cheapest for Them as Against the Right of Ownership of Property

Throughout Petitioner's brief, the theme is that union organizers have the right to distribute their literature and solicit union membership at the location or locations most

*Emphasis added.

convenient to them, in the quickest manner and with the least expense possible. Where do they get such a right? The Act does not expressly or impliedly give to non-employee organizers such right. The Board, based on a conclusion that the union could not readily distribute its literature off Respondent's premises, gave to its organizers the right to make distribution thereof on Respondent's property, the place most convenient for it.

The first question presented by Petitioner to the court is conditioned upon it being unreasonably difficult for the union to reach the employees off company property *in the immediate vicinity of the plant.* The Board did not find in its decision in this case that it was unreasonably difficult for the union to distribute its literature to the employees off company property as Petitioner now argues. The finding in this connection was merely that the union could not readily distribute its literature off Respondent's premises (R. 75), from which it concluded an unreasonable impediment to self-organization was created. (R. 77.) As hereinafter shown, the only place in the immediate vicinity of the plant that there was any attempt made to reach Respondent's employees by the union was on a strip of public right of way, 31 feet in width, between Respondent's property and the highway at the point where Respondent's driveway intersects the highway. Though some difficulty was encountered, the union was successful in reaching Respondent's employees in this manner on each occasion that it tried. There are numerous other places in the immediate vicinity of Respondent's plant at which the

union organizers could contact Respondent's employees which were not used by the union organizers.

Even if we are to concede that the immediate vicinity of the plant is the most convenient place for distribution of union literature and perhaps the least expensive, the Act does not give to the non-employee union organizer the inherent right to do his solicitation at the place most convenient to him, particularly at the sacrifice of the property rights of others. The Petitioner's argument, at page 11 of its brief, that the union cannot convey information to employees unless it has access to the employees in the immediate vicinity of the plant, is completely fallacious. Respondent is surprised at Petitioner advancing such an argument with all of the means, devices and methods of communication that we have and which were at the union's disposal here, had it desired to use them. As is hereinafter shown, and is as in effect conceded at page 40 of Petitioner's brief, the union had and has ample means of communication with Respondent's employees. The union naturally desires to effect this communication in the manner most convenient and cheapest to it but it has no such right. Particularly so, when the rights of others are to be thereby sacrificed.

Respondent recognizes that employees are entitled to freedom in receiving advice and information from others concerning their rights under the Act. However, this does not give to the union organizers, in a situation such as we have here, the right to exact a servitude upon the employ-

er's property whereby the employer is required to permit the union organizer to go on his property and there find the employees, as a captive audience, and force literature upon them irrespective of whether or not they wished to be bothered with the literature. Such a requirement would in effect abridge that portion of the Act which specifically gives to the employees the right to refrain from any and all union activity if they so desire.

If we are to face realities, we must face the fact that labor unions in this United States are big business with substantial wealth at their control. Where do the representatives of this business get the right to use another's property in the furtherance of their efforts solely because it will be easier, cheaper and more convenient for them, as contended by Petitioner? Surely the employer is not called on to furnish a forum for the union organizer, in order to make his job easier, quicker and cheaper for him. An employer is not required to aid employees to organize but only not to interfere. *N. L. R. B. v. Stowe Spinning Company, 336 U. S. 226, 241.*

On the conclusion that there was a safe and practicable place on Respondent's property, that is, its parking lot and alongside its walkways and drive, at which union literature could be distributed (R. 76), coupled alone with the conclusion that such places were the most convenient places for the union to distribute its literature or, in the language of the Board, that distribution of literature could not readily be conducted away from Respondent's premises (R. 75), Petitioner contends that such gives to the union the

right to there distribute its literature, notwithstanding that such places are the private property of Respondent.

The magnitude of the right to own and control property has always been recognized and jealously guarded by our courts as a necessary part of liberty and freedom. The right has never been lightly dealt with. It is of such importance to our society and democracy that it is protected and guaranteed by the *Fifth Amendment to the Constitution of the United States.* Admittedly, the exercise of the elements of enjoyment and ownership of property are subject to government regulation to the extent that the exercise of an equally valuable and important right by another shall not be denied to him. However, in each instance that our courts have found it necessary to make some dislocation of property rights in favor of strangers, it was only when the stranger had encountered an insuperable and unsurpassable hardship or difficulty in exercising some Constitutional right, for example, his freedom of communication with others. Among the cases discussing this "dislocation" of property rights are those of *N. L. R. B. v. Stowe Spinning Company, 336 U. S. 226; Marsh v. Alabama, 326 U. S. 501,* and *N. L. R. B. v. Lake Superior Lumber Corporation, 167 F. 2d 147 (C. A.-6).* While there was actually no dislocation of a property right in the *Stowe Spinning Company case,* inasmuch as the employer in that case had already given up the right to control who would use the property involved, by leasing it to another, this Court suggested that a dislocation of the property right might be in order because the employer was clearly discriminating against the

union involved. In the *Lake Superior Lumber Corporation* case, the distributor of literature encountered insuperable difficulty in distributing literature because the distribution was being prohibited in a company owned lumber camp where employees not only worked, but lived and maintained their homes, which employees had a right to receive the literature being distributed. In the *Marsh* case, there was actually no dislocation of a property right, but in support of the principle of freedom of communication, this court held unconstitutional a statute which prohibited the distribution of literature upon the public streets in the company owned town of Chickasaw, Alabama. There are several cases decided by this court which involve the same principle, among which are the *Schneider v. State of New York, 308 U. S. 147; Lovell v. City of Griffin, 303 U. S. 444; Martin v. City of Struthers, 319 U. S. 141; Jamison v. Texas, 318 U. S. 413*, and *Thomas v. Collins, 323 U. S. 516*, each of which is cited by Petitioner. Respondent does not contend against the principle in those cases, but such decisions do not support the position which Petitioner takes before this court at this time.

It is not necessary for the court to pass on the soundness of the dislocation rule in this case, inasmuch as the order of the Board is clearly incorrect for other reasons. Nevertheless, Congress even if it could constitutionally do so, has at no time shown any intention of destroying property rights secured by the *Fifth Amendment*, in protecting employees' rights of collective bargaining under the Act. Until Congress should evidence such intention by specific

legislative language, our courts should not construe the Act on such dangerous constitutional grounds. The courts should always construe statutes so as to avoid the least risk of constitutional infirmity. *United States v. C. I. O., 335 U. S. 106, 120-121; Kovacs v. Cooper, 336 U. S. 77, 85.* Even if Congress should evidence such intention by specific legislative language, then the dislocation rule, if it has any validity, should only be applied in a very strong case, that is, where insuperable difficulty has been encountered in exercising the rights granted by the Act. No facts here exist to justify its application in any event.

3.

There Has Always Been a Distinction Between Rights of Employees and Non-Employee Organizers

The Board always preserved a distinction between the rights of employee and non-employee organizers until after the decision of this court in the case of *N. L. R. B. v. LeTourneau (1945), 324 U. S. 793.* Since that time the Board has misconstrued the *LeTourneau* case so as to equalize the rights of employee and non-employee union organizers. The *LeTourneau* case does not justify such equalization. The question was not involved in the *LeTourneau* case. The question not being involved, the *LeTourneau* case is not authority for that which Petitioner cites it, nor is it dispositive of the issue here before the court as contended by Petitioner.

The position of the Board on the matter of distribution of union literature on company property by non-employee

union organizers before the decision in the *LeTourneau* case is shown by its decisions in the cases of *North American Aviation, Inc. (1944), 56 N. L. R. B. 959*, and *Tabin Picker Company (1943), 50 N. L. R. B. 928.*

In the *North American Aviation* case the Board stated:

> "Rule prohibiting distribution of literature or written or printed matter of any description on company premises is not violative of N. L. R. A.; promulgation of such rule by employer does not constitute interference where it is not shown that the rule has been discriminatorily enforced."

In the case of *Tabin Picker Company* the Board stated:

> "Discharge of most active union members for distributing union handbills in plant announcing an open union meeting was not discriminatory inasmuch as, in the interest of keeping plant clean and orderly, it is not unreasonable for an employer to prohibit distribution of literature on plant premises at all times and such restrictions had not been discriminatorily enforced."

After this court rendered the decision in *LeTourneau, 324 U. S. 793 (1945)*, in which it held that an employer could not prevent employees from distributing union literature on its parking lot under the circumstances as were present in that case, the Board has misconstrued and extended that decision so as to give non-employee union organizers the same rights in this connection as employees. This, the Board has done, notwithstanding the fact that in the decision in the *LeTourneau* case, this court stated that the sole question involved was whether, under the circumstances, the rule of the employer to the extent that it prohibits distribution of union literature by employees

on parking lots, constitutes such a serious impediment that it must give way. When the *LeTourneau* case was before this court, the Board in its brief, at page 29, footnote 17, argued:

> "The facts in the instant case do not present, and the Board did not consider the question which would arise if union representatives who were not employed at the plant sought to distribute literature on the parking lots."

Among the cases in which the Board has extended to non-employee union organizers this right, and here relied on by Petitioner, are the cases of *N. L. R. B. v. Carolina Mills, Inc., 92 N. L. R. B. 1141, enforced 190 F. 2d 675 (C. A.-4)*, and *N. L. R. B. v. Caldwell Furniture Company, 97 N. L. R. B. 1501, enformed 199 F. 2d 267 (C. A.-4)*.

The *Carolina Mills* case was enforced in a per curiam decision in which no cases are cited by the court enforcing the order. While Respondent respectfully submits that the *LeTourneau* case, if such was the basis of the Fourth Circuit Court's decision therein as here contended by Petitioner, does not support the *Carolina Mills* decision, in any event, the facts in the *Carolina Mills* case are so different from the facts of the instant case that it is not authority for the position of Petitioner herein. In the *Carolina Mills* case there was a *discriminatory enforcement* of a no-distribution rule, *the union involved was the bargaining representative* of the employees, there was *no other place at which distribution of union literature could be accomplished*, the *employer was engaging in an anti-union cam-*

paign and the *employer had a history of unfair labor practices.* None of these facts are present in the instant case.

The *Caldwell Furniture Company* case was also decided by the Fourth Circuit Court of Appeals, in a short per curiam decision relying on the *LeTourneau* case and the *Carolina Mills case.* Here again the facts are different and the *Caldwell* case does not support the present position of Petitioner. In the *Caldwell* case, the employer's plant was located immediately adjacent to the highway and there was no area between the company property and the highway where distribution could be made by union organizers, and it was virtually impossible to make distribution off the employer's premises. Here, it has been shown that distribution could be made off Respondent's premises, but the Board in effect says, this being inconvenient for the union, it is not required to resort to such other places to distribute its literature. Also, as pointed out by the Ninth Circuit Court of Appeals in its decision denying enforcement of a Board order similar to the one here involved in the case of *Monsanto Chemical Company, 225 F. 2d 16, 19, petition for certiorari pending,* the question here presented, i.e., the prohibition of the non-employee union organizers from distributing literature on company property, does not appear to have been raised in the *Caldwell* case, for the court makes no mention of it.

Each of the other cases cited by Petitioner, those of *Ranco, Inc., 109 N. L. R. B. 998; Seamprufe, Inc., 109 N. L. R. B. 24,* and *Monsanto Chemical Company, 108*

N. L. R. B. 1110, as authority for its position here taken, are pending before this court, the first two on writs of certiorari granted and the latter on petition for certiorari pending. The order of the Board wrongfully extending the holding of this court in the *LeTourneau* case was denied enforcement in the *Seamprufe* case (C. A.-10) and the *Monsanto* case (C. A.-9), and ordered enforced in the *Ranco* case (C. A.-6). The findings in the *Ranco* case are not analagous to the findings in the case here presented and such decision of the Sixth Circuit Court of Appeals does not support Petitioner herein. In the *Ranco* case the employer was permitting distribution of union literature on its property and its employees were interested in such distribution. Notwithstanding this distinction, Respondent submits that the decision of the Sixth Circuit Court of Appeals in the *Ranco* case is clearly wrong and is not supported by the decision of this court in the *LeTourneau* case, cited by the Sixth Circuit Court as being authority for the decision.

While Petitioner makes no mention of the case before this court, it relied on the case of *N. L. R. B. v. Monarch Machine Tool Company, 210 F. 2d 183 (C. A.-6)*, in the court below. However, the no-distribution rule was there adopted by the employer during the middle of an organizational campaign for the sole purpose of discouraging organization of its employees, and then applied as to distribution of literature by employees. Thus, the *Monarch Machine Tool Company* case is not authority for the position here taken by Petitioner. It is assumed Petitioner

concedes such inasmuch as no reference is made to the *Monarch* case in Petitioner's brief to this Court.

In 1952, the Board made an unwarranted extension of the holding of *LeTourneau* in the case of *Marshal Field & Company v. N. L. R. B., 200 F. 2d 375 (C. A.-7)*. The Seventh Circuit Court of Appeals, in a well reasoned opinion, modified the order of the Board, and refused to enforce that portion of the order which required an employer to permit non-employee union organizers to come upon the employer's premises, except to the extent of permitting the organizers to distribute literature on an alleyway, Holden Court, which partook of the nature of a city street. The Seventh Circuit Court of Appeals therein at *200 F. 2d 381* stated:

> "In its decision and in the Board's argument before this court, the Board relies heavily upon the *Republic Aviation Corporation v. N. L. R. B.* and *N. L. R. B. v. LeTourneau Company of Georgia* cases, *324 U. S. 793, 65 Supreme Court 982, 89 Lawyers Addition 1372*. It seems advisable therefore to analyze just what the Supreme Court decide din those cases. In the first place the cases involved *only union organizers who were employees of each company respectively*."

This unwarranted extension of the holding of this court in the *LeTourneau* case by the Board is now, for the first time, reaching the Supreme Court of the United States. There are four cases, the first of which is the instant case, the other three of which are cited above, pending before this Court at this time, which have substantially the same question involved.

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*Emphasis added.

4.

The Supreme Court Never Intended for the Holding in the Le Tourneau Case to Apply to Non-Employees

Certainly, this Court did not intend for its decision in the case of *N. L. R. B. v. LeTourneau Company, 324 U. S. 793*, to apply to non-employee union organizers. Mr. Justice Reed was th organ of the Supreme Court in the *LeTourneau* case and certainly he fully understands and appreciates the full import of the Court's opinion therein. Mr. Justice Reed had occasion to discuss the *LeTourneau* decision in the case of *N. L. R. B. v. Stowe Spinning Company, 336 U. S. 226, (1949)*. In that case, this Court held that the employer involved had violated the Act by requiring that a fraternal organization, to whom it had leased a company owned hall, cancel a rental agreement for use of the hall by the union. The Court, in so finding, expressly stated that its finding was based solely on the fact of discrimination, in the following language:

> "What the Board found, and all we are considering here, is discrimination. The decree should be modified to order Respondent to refrain from any activity which would cause a union's application to be treated on a different basis than those of others similarly situated." *336 U. S. 233.*

Even though there was discrimination against the union involved in the *Stowe Spinning* case, Mr. Justice Reed wrote a dissenting opinion, joined in by Mr. Chief Justice Vinson, in which he expressly pointed out that the *LeTourneau* case was not authority for the decision reached in the

Stowe Spinning case in that the *LeTourneau* case involved the prohibition of employee distribution of literature on company property during their non-working time as distinguished from non-employees. Mr. Justice Reed wrote at *336 U. S. 243* the following:

> "There is nothing in this record that indicates a situation such as exists in employer owned lumber camps or mining properties. *It his never been held that where the employees do not live on the premises of their employer a union organizes has to be admitted to those premises.* The present situation differs from the employer controlled areas where the employees both live and work in that here union organizers may solicit the employees on the streets or in their homes or at public meeting houses within a few miles of their employment. Employees are not isolated beyond the hours of labor from an organizer nor is an organizer denied access to the employees. *After an organizer has convinced an employee of the value of union organization, that employee can discuss union relations with his fellow employees during non-working hours in the mill. This gives opportunity for union membership proliferation.*"* *Republic Aviation Corporation v. N. L. R. B.* and *N. L. R. B. v. LeTourneau Company of Georgia, 324 U. S. 793.*

In the *Stowe Spinning* case, Mr. Justice Jackson, while concurring in the result reached, did not agree with the reasoning by which it was reached and dissented in part, in which dissent, he clearly pointed out that he concurred in the result only because, to his satisfaction, the *Fifth Amendment to the Constitution of the United States* was not involved in that the Company had given up certain

*Emphasis added.

property rights in the property involved by committing its possession to someone else and that the Employer, having committed control of the property to someone else, could not properly interfere and command reversal of the other parties approval of the union's use of that property.

It is clear that Petitioner here asks this Court to enforce an order which is without precedent or authority and which seeks an extension of the holding of this Court in the *Le-Tourneau* case never intended by this Court, and in which this same Petitioner represented to the Court, in its brief, that the facts therein did not present, and the Board did not consider, the question of non-employees distributing literature on the employer's parking lot.

5.

Order of Board Improperly Equalizes Rights of Employees and Non-Employees

The order entered by the Board, which Petitioner here seeks to have enforced, accords to non-employee union organizers exactly the same rights and privileges as is accorded unto employees. The equalization of those rights was never intended by the Act, nor by Congress. As stated by the Fifth Circuit Court of Appeals in the case of *National Labor Relations Board v. Swartz*, 146 F. 2d 773 *(1945) at page 774:*

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the benefit of labor unions, * * *."

The Second Circuit Court of Appeals recognized the distinction between the rights of employees and the rights of non-employee union representatives in the case of *N. L. R. B. v. Cities Service Oil Company, 122 F. 2d 149 (1941)* wherein it held that though the employer had violated the Act by refusing to permit the union which represented the employees to come aboard its vessel to see the employees, it specifically excluded the right of those representatives to solicit union membership on board the vessels. The court stated, at page 152, in this connection, the following:

> "There can, however, be no reason for giving the representatives of the union passes, in order that it may solicit new members or collect dues * * *. The rights guaranteed by Section 7 (of the Act) primarily concerns bargaining as to terms and conditions of employment and not the perpetuation of the tenure of any particular agent. * * * *at all events the employer should not be required to issue passes except subject to the condition that they will be forfeited if the holder shall use his access either to solicit union membership or to collect dues."**

There is all the more reason why an employer should not be required to permit non-employee union representatives to solicit union membership on its property when the union is not the bargaining agent of the employees and the employees do not live on the employer's premises, as here.

In the case of *Richfield Oil Corporation v. N. L. R. B. (1944), 143 F. 2d 860*, the Ninth Circuit Court of Appeals held that though the employer was required to permit union officials that represented the employees who lived on board the employer's vessels to come on board its vessels for the

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**Emphasis added.

purpose of collective bargaining, such union representatives were not entitled to solicit union membership on the employer's vessels.

Each the Ninth Circuit Court of Appeals in the case of *N. L. R. B. v. Monsanto Chemical Company, 225 F. 2d 16, petition for certiorari pending*, the Tenth Circuit Court of Appeals in the case of *N. L. R. B. v. Seamprufe, 222 F. 2d 858, certiorari granted*, and the Fifth Circuit Court of Appeals in this case recognized that basic distinctions exist between rights accorded employees and non-employees by the Act. *Section 7 of the Act* specifically gives the rights encompassed in the Act to employees and also specifically provides that employees shall have the right to refrain from any or all of the activities provided for in the Act. Non-employees have no rights under the Act except such rights, by inference, as are necessary to prevent the rights accorded employees from being forfeited. Nevertheless, the Board here seeks to have this Court perpetuate an order of its own which would equalize the standards governing the conduct and rights of employees and the standards governing the conduct and rights of non-employee union organizers under the Act. Such equalization was never intended by Congress, and is not provided for, either expressly or impliedly by the Act. A distinction between those rights has been consistently recognized by our courts and properly so. The Petitioner here seeks to do away with that distinction. The Petitioner seeks to justify such equalization by arguing that it has put ample safeguards in the order by which it permits the employer to impose reasonable rules and regulations. (Petitioner's Brief, pp. 18, 23-26.) Such argu-

ment is completely foreign to the question before this Court. To require that employees be permitted to distribute literature on the employer's parking lot, does not invade his property or abridge his rights, they being licensees, as does the requirement permitting non-employees to distribute literature on the employer's parking lot. The employee already has a license from the owner of the parking lot to use it. Our courts have consistently recognized basic distinctions between the rights of licensees and strangers to the use of property in a variety of situations. The courts should not entertain the thought of equalizing those rights in any situation unless and until specifically provided for by Congress. Even then serious questions under the Fifth Amendment to the Constitution would arise.

Also, Respondent questions if the right which the union seeks to have enforced through the medium of the Board in this case is not a right which exists solely in behalf of the employees of Respondent and that they, and they alone, may seek enforcement of that right.

This Court has in many cases held that one can assert only his own rights and not the rights of others. Among such cases are those of *Jeffry Manufacturing Company v. Blagg, 235 U. S. 571* and *Bourjois Inc. v. Chapman, et al., 301 U. S. 183*. In this connection attention is called to the fact that the charge on which this case originated was filed by the Union, no employees of Respondent complained, and no employee of Respondent testified in behalf of the complaining union on the question here before the court, at the hearing held by the Board.

6.

Burden of Proof Is Improperly Placed on Respondent

Petitioner premises its argument in its brief by a conclusion that it was unreasonably difficult for the non-employee union organizers to distribute their literature at places other than on Respondent's property. The Board, in its decision, did not so find but merely found that union literature could not readily be distributed off Respondent's premises. Petitioner, in its brief herein, places the burden of proving unreasonable difficulty, whatever the term means, upon Respondent, and places the further burden upon Respondent of proving that distribution of union literature upon its property would interfere with its business. This burden is properly upon the Petitioner and not on the Employer. *Universal Camera Corporation v. N. L. R. B., 340 U. S. 474.*

The term "unreasonably difficult" is certainly an abstract term with little real meaning. At any rate, the Petitioner did not prove in this case that it was unreasonably difficult for the union to distribute its literature at places other than on Respondent's property. The most that can be said for the evidence in this connection is that the non-employee union organizer found some difficulty in distributing its literature on the public property at the point where Respondent's driveway intersects with the highway. But to say that it was unreasonably difficult for it to distribute its literature at this point is a stretch of the imagination and is in direct conflict with the evidence that, on

each of the three occasions the union organizers attempted to distribute literature at this point, they were successful.

The Board found that on June 15, 1953, the Union succeeded in distributing 300 pieces of literature to the 325 employees who were driving in and out of the driveway; on June 30, 1953, it was successful in distributing 195 pieces of union literature to 250 employees who were driving in and out of the driveway; and on July 13, 1953, over 225 pieces of union literature were passed out to 250 employees who were leaving work. (R. 69.) These were the only occasions on which the union attempted to distribute its literature at this point. Thus, it is apparent that on each occasion the union attempted to distribute literature on the 31 foot strip of public property between Respondent's property and the highway it was successful in distributing its literature to approximately 90% of all of Respondent's employees who were present on each of such occasions.

All of the evidence that was produced in the hearing below as to the difficulty of the union in distributing literature to Respondent's employees was and is to the effect that on the three occasions that they did distribute literature to Respondent's employees at the point where its driveway intersects with the public highway, it caused the cars of Respondent's employees to stop and become enmeshed in a traffic jam; that on one occasion Respondent's watchman and personnel manager had assisted in directing the traffic to become unsnarled, that the union organizers had been instructed by the local sheriff's department and local highway patrol to cease distribution at this point because

it was hazardous. The Petitioner did not seek at the hearing to introduce any other testimony in this connection but apparently took the position that this was sufficient to meet its burden of proof and from that point Respondent had the burden of proving that it was not unreasonably difficult for the union organizers to distribute their literature *at other places*, and the burden of proving that distribution on its property would interfere with its business. No attempt was made to establish that any other effort to contact the employees or to distribute their literature to the employees was unsuccessful or difficult. Nor, was any evidence produced that the actual distribution of literature at the intersection of Respondent's driveway with the highway was hazardous, Petitioner relying, in this connection, solely upon the hearsay statement to the union by the local sheriff and highway patrol that it was hazardous. The law enforcement officers were not called as witnesses. The fact that employee's cars had to stop and travel slowly as union literature was being distributed, in actuality afforded the union greater opportunity to distribute its literature.

These facts alone are not sufficient to meet the burden of proving impossibility and unreasonable difficulty of distributing union literature to an employer's employees, nor do they support the conclusion that it is unreasonably difficult to distribute union literature to Respondent's employees at places other than on its property. Such conclusion on the part of the Board, in its Brief, not only is contrary to the facts in this case, but is an indulgence in an inference not supported by the record as was done by the Board in the

cases of *Republic Aviation v. N. L. R. B., 324 U. S. 793* and *LeTourneau v. N. L. R. B., 324 U. S. 793*. Such practice was specifically condemned by Congress in its discussion of the Taft-Hartley Act and was condemned by this Court in the case of *Universal Camera Corporation v. N. L. R. B. (1950), 340 U. S. 474*. Mr. Justice Frankfurter, in writing the opinion therein, discussed the legislative history of the Taft-Hartley Act and the Administrative Procedure Act wherein Congress clearly expressed its intention that findings of the Labor Board, based on inference not supported by substantial evidence, should not be permitted to stand by an appellate court, and then stated:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. * * * Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." *340 U. S. 490.*

It is submitted therefore, that the Trial Examiner's conclusion that union literature could not readily be distributed off Respondent's premises, and Petitioner's argument in its brief, that it is unreasonably difficult for the union to distribute its literature entirely off of Respondent's premises are but inferences not based upon substantial evidence, and at no time during the proceeding did it become incumbent upon Respondent to show that distribution of union literature could be distributed at places other than on Respondent's property or that distribution would create a produc-

tion or disciplinary problem. Further, no findings by the Board in its decision, support or authorize the argument now made by Petitioner that it is unreasonably difficult for the union to distribute its literature off Respondent's premises. Accordingly, it is the position of Respondent that the term "unreasonably difficult" is improperly embodied in the question presented to the court by Petitioner. Consequently, the court below properly denied enforcement of the order of the Board.

7.

There Are Adequate Means of Communication Between Respondent's Employees and the Union

The record shows that there were adequate avenues of communication open to the non-employee union organizers for them to communicate with Respondent's employees. Respondent's refusal to permit the non-employee union organizers to come on its parking lot and distribute their literature did not, and does not, cause any undue impediment to the right of self organization existing among its employees.

As already shown, there is a 31 foot wide strip of public property between the paved portion of the highway passing Respondent's plant and its plant property and the union organizers, on each of the three occasions they attempted to distribute literature at this point, were successful in reaching over 90% of all of Respondent's employees that were then using the parking lot. Additionally, the union organizers mailed union literature to approximately 100

of Respondent's employees on each of three occasions during the summer of 1953. (R. 71-72.) Union representatives communicated with *many* of Respondent's employees by talking with them on the streets of Paris, by driving to their home and talking with them there, and by talking with them over the telephone, all of which contacts were for the purpose of soliciting the adherence and membership of employees in the union. (R. 71-72.)

The plant of Respondent is located about 1 mile from the city limits of the town of Paris, Texas, which is a town of 21,000 people and the union organizers have all the various facilities available to them that a town that size affords, such as local newspapers, local radio stations, civic organizations, public meeting places, etc. (R. 66.) Additionally, all of the property that Respondent owns in the entire area of Paris is its plant site which consists of 100 acres of land, entirely contigious, lying entirely on one side of a public highway known as Farm to Market Road 137. (R. 214.) The only public road which goes along Respondent's property is Farm to Market Road 137 ,(R. 67.) As Respondent's employees leave its plant and enter the public highway, if they go in a Northerly direction, which most of them do, they must traverse about ¾ of a mile before the first cross roads is reached, and if they go in a Southerly direction they must traverse 2 or 3 miles before the first cross roads is reached. (R. 68.) Thus there is 31 feet of public property on each side of the highway in front of Respondent's plant; private property, not controlled by Respondent in any way, across the highway from Respondent's plant, and private property, not controlled by Respondent in any way, adjacent to the

public highway right of way to both the North and the South of Respondent's property, by which all of Respondent's employees must pass in going to and from work. At each of these points literature can be distributed.

These various avenues of communication are sufficient and adequate avenues open to the use of non-employee union organizers if they were but exploited. In fact, the record shows that the union organizers were successful in using these avenues of communication to the extent that they attempted such. The union organizers attempted to communicate with Respondent's employees only during three months, June, July and August of the year 1953. During that short period of time they were successful in reaching most of Respondent's employees. However, the Union apparently decided that it would be quicker, easier and cheaper to see Respondent's employees on Respondent's parking lot. On August 28, 1953, the union organizers made the request of Respondent that they be permitted to come on the parking lot and distribute literature. This request was denied, which results in this matter being before the Court at this time. (R. 219-220.)

It may be, as the Board argues, that it is a little more expensive, it may take a little more effort, and a little more time for non-employee union organizers to contact the employees of an employer through the various means of communication that are open to them away from the employer's property, but surely, this inconvenience does not lead to the conclusion that it is unreasonably difficult to distribute literature elsewhere than on the employer's property; and

to the further conclusion that such inconvenience gives the non-employee union organizer the right to come upon the employer's property and use that property to the own aims and satisfactions of the union. Certainly the union organizers had ample opportunity to contact and converse with and did contact and converse with Respondent's employees at places other than on Respondent's property.

Respondent's employees are working a normal 40-hour per week schedule on two shifts, They are not engaged in long hours such as were the employees in the *LeTourneau* case. The union organizers may solicit the employees on the streets and in their homes and at public meeting places within a few miles of their employment, and if an organizer has convinced an employee of the value of union organization that employee can discuss union organization with his fellow employees during non-working hours in the plant. This gives ample opportunity for union membership proliferation. There is no unreasonable impediment to the employees freedom of communication by the non-discriminatory enforcement of Respondent's rule prohibiting non-employee union organizers from distributing literature on Respondent's property.

Respondent takes no issue with Petitioner that its employees are entitled to receive any literature they so desire. *Schneider v. State of New York, 308 U. S. 147.* Respondent will do everything within its power to protect this right. However, Respondent does take issue with Petitioner in its argument that distribution of literature at places other than on the property of Respondent is ineffective.

Respondent is not aware of any decision of this court which constitutes authority for the argument, and inference in the question presented in Petitioner's brief, that the immediate vicinity of the plant is the only place that affords the union ample and reasonable opportunity to communicate with employees and to distribute union literature. It is submitted that so long as the opportunity for effective and adequate communication between employees and union representatives exists at places other than in the immediate vicinity of the plant, there is no necessity that the communication be carried on in such immediate vicinity, and no justification exists for an abridgement of the traditional right of a property owner to control his property, select his own invitees and licensees, and to exclude trespassers. If this right of the property owner is to be abridged at all, it should be abridged only when the stranger to the property owner has encountered insurmountable obstacles in exercising his right, whatever it may be.

It was recognized by this Court in the *Schneider case* (supra) relied on by Petitioner, that the most effective distribution of literature was done in the homes in the following language:

> "As said in *Lovell v. City of Griffin (303 U. S. 444)* pamphlets have proved most effective instruments in the dissemination of opinion and perhaps the most effective way of bringing them to the notice of individuals *is their distribution at the homes of the people.*"*

Such right of distribution at people's homes and on public streets was the right recognized by this Court in each of

*Emphasis added.

the cases of *Martin v. City of Struthers, 319 U. S. 141; Jamison v. Texas, 318 U. S. 413* and *Lovell v. City of Griffin, 303 U. S. 444*, all cited by Petitioner. This right Respondent recognizes and will defend at all costs. For the same reasons, Respondent will oppose at all costs, any theory that the owner of private property must permit one group to distribute literature, to the exclusion of others, on his property. Particularly does Respondent oppose such an order in this instance involving distribution of literature by the union where the union has reasonable opportunity to contact the individuals sought to be contacted elsewhere. Certainly, as Petitioner argues, it is no answer, that communication may be made elsewhere to a denial of freedom of communication in *appropriate places*. (Petitioner's Brief, page 43.) However on the facts of this case, Respondent's property is not an appropriate place, within the framework of our constitution and laws, for the method of communication here sought to be indulged in by strangers.

8.

Petitioner's First Question Stated in Its Brief Was Not Decided by the Court Below

In passing, Respondent calls attention to the fact that Petitioner, in presenting its first question, states an entirely different question to that decided by the Court below. Nowhere in the order of the Board is it found that Respondent should be required to permit non-employee union organ-

izers to distribute union literature on its plant parking lot during employees *free time*. Also, nowhere in the order of the Board is there a finding to the effect that distribution must be permitted under the Act *where it is unreasonably difficult for the union to reach the employees off company property in the immediate vicinity of the plant*. While the record shows that the union wrote a letter to Respondent requesting that it be permitted to distribute union literature in leaflet form to Respondent's employees on the parking lot at a time when the employees were coming to and leaving work, this phase of the request was ignored in the charge by the union, also in the complaint issued by the Board, and not raised until this case came before this Court. The order of the Board requires Respondent to permit distribution on its parking lot, walkways and drive without reservation as to time. (R. 219; 9-13; 18.)

Also, at no place in the record is there a finding, nor was the matter litigated, to the effect that it was *unreasonably difficult* for the union to reach the employees off company property *in the immediate vicinity of the plant*. The most that was found in this connection, with which finding Respondent disagrees, is that the right of way between the black top and Respondent's drive is not a safe or practicable location for distribution of literature to Respondent's employees and that distribution of literature cannot be readily conducted away from Respondent's premises. (R. 75.) The question decided by the Board, and by the Court below, is believed to be more fairly presented in the statement of questions made earlier in this brief.

B.

Second Question

The Court below properly denied enforcement of the Board's order because it is too broad, vague and indefinite to warrant enforcement.

1.

Petitioner's Second Question, Stated in Its Brief, Is Incomplete

The second question presented in Petitioner's brief is incomplete in that it does not encompass the vagueness and indefiniteness of the Board's order. The order which Petitioner seeks to enforce requires Respondent to cease and desist from prohibiting distribution of union literature on its parking lot, walkways and drive except that Respondent may impose reasonable and non-discriminatory regulations in the interest of plant efficiency and discipline. What are reasonable regulations?

The order, in addition to having the evil of being too broad in its scope, is vague and indefinite, and the court below properly denied enforcement thereof.

2.

The Board's Order Is Too Broad, Vague and Indefinite to Warrant Enforcement

(a) Vagueness and Indefiniteness of Board's Order

This Court in the case of *National Labor Relations Board v. Express Publishing Company (1941), 312 U. S. 426, 433,* in an opinion by Mr. Justice Stone stated:

> "It is obvious that the order of the Board which, when judicially confirmed, the courts may be called

> on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the Acts which the Respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain a practice which it has found the Employer to have committed is not an authority to restrain generally all the other unlawful practices which it has neither found to have been pursued or persuasively to be related to the proven unlawful conduct."

Again, this court stated in the case of *May Department Stores Company v. N. L. R. B. (1945), 326 U. S. 376, 390,* in an opinion by Mr. Justice Reed, the following:

> "The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it from engaging in any unfair labor practice effecting commerce."

The order which the Board entered and which Petitioner here seeks to have enforced, does not meet either of these tests. First, the order provides that Respondent may impose reasonable regulations with regard to the distribution of literature on its property by non-employee union organizers. Respondent has not the faintest idea as to what would be or what are reasonable regulations in this respect. The order does not set out what reasonable regulations may be imposed but leaves it to the discretion or imagination of the employer. Further, Respondent does not know how such regulations could be enforced against any individual who was not an employee of Respondent. Once the individual was granted permission to come upon Respondent's property, Respondent would have no control over

his actions except to eject him, and the order prohibits Respondent from doing this. Consequently, the order in one part attempts to give Respondent some means of regulation over the distribution of the literature, and then takes away that right in the next part.

As an example of the vagueness and indefiniteness of the order, Respondent poses the question that, were it to police its parking lot so as to establish reasonable rules, whatever the term might mean, for its use by non-employee union organizers, would it then be charged with surveillance or interference in violation of Section 8(a)(1) of the Act?

(b) Extending Order to Like or Related Acts

The order is not only vague and indefinite with reference to what Respondent is privileged to do and required not to do in connection with its refusal to permit the distribution of literature on its property by the union, wrongfully found by the Board to constitute an unfair labor practice, but goes further, and in the broad language of the statute requires Respondent to cease and desist from engaging in any like or related acts or conduct in violation of *Section 7 of the Act*. The last mentioned portion of the order being worded in exactly the language of *Section 7 of the Act*. Certainly, the Board had no basis upon which to reasonably conclude from the evidence that such an order was necessary to prevent Respondent from engaging in any unfair labor practice. The only unfair labor practice which the Board found Respondent had engaged in was that of refusing to permit the non-employee union organizers to

come on its parking lot to distribute literature. The other allegations of unfair labor practices against Respondent were dismissed by the Board. Nor is there any threat of future violations. The Petitioner argues that Respondent had a blanket no-distribution rule which applied to employees as well as non-employees directly contrary to the ruling in *LeTourneau*. (Petitioner's brief, 46.) While there is some evidence in the record to this effect, this matter was not litigated before the Trial Examiner, there being no complaint which encompassed such an issue against Respondent and Respondent did not attempt to rebut the testimony that was so introduced. Respondent did not at the time of the hearing have and does not now have a blanket no-distribution rule which would prevent its employees from distributing literature on its property, and had it had the experience of employees distributing literature upon its property ,it would not have interfered therewith so long as employees were doing the distribution upon their own time and not in violation of its good housekeeping rule. This is not in this case and is not now before this Court for determination.

The order on its face, broad, indefinite and vague as it is, should not be enforced.

VIII.

CONCLUSION

Thus we find that over a period of years, since this court sustained the constitutionality of the Act in the year 1937 in the case of *N. L. R. B. v. Jones & Laughlin Steel*

Corp., *301 U. S. 1.*, the Board has pyramided its decisions and orders to the extent that it now seeks to seize an employer's property by exacting a servitude against it in favor of a particular union, requiring the employer to discriminatorily apply a non-discriminatory no-distribution rule in favor of that union, and give unto the organizers of that union, though not employees lawfully on the property, the right to use the employer's property for the purpose of distributing their literature and "discussing with the employees the questions that the literature is bound to evoke." All of this, attempted to be accomplished by an order vague and indefinite in purpose, as broad as the Act itself, and encompassing terms which an employer is called upon to obey that have never been dfined by the Board or the courts. Certainly Congress never intended for such a result to be achieved by the National Labor Relations Act.

For the reasons stated, the judgment of the court below, denying enforcement of such an order, should be affirmed.

Respectfully submitted,

O. B. FISHER,
Liberty National Bank Bldg.,
Paris, Texas,
Attorney for Respondent.

December, 1955.

IX
CERTIFICATE OF SERVICE

The undersigned Counsel for Respondent certifies that five copies of the foregoing brief were deposited in a United States Post Office with air mail postage prepaid to each Hon. Simon E. Sobeloff, Solicitor General, Department of Justice, Washington 25, D. C., and David P. Findling, Esq., Associate General Counsel, National Labor Relations Board, Washington 25, D. C., this December 27th, 1955.

O. B. FISHER,
Liberty National Bank Bldg.,
Paris, Texas,
Attorney for Respondent.

APPENDIX A

The order entered by the National Labor Relations Board, which it here seeks enforced, reads as follows:

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Babcock and Wilcox Company, Paris, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Prohibiting the distribution of union literature by union representatives on its parking lot and alongside the walkways from the gatehouse to the parking lot and the drive, provided, however, that the Respondent may impose reasonable and nondiscriminatory regulations in the interest of plant efficiency and discipline, but not as to deny access to union representatives for the purpose of effecting such distribution.

(b) Engaging in any like or related acts or conduct which interferes with, restrains, or coerces its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, C. I. O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or pro-

tection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Rescind immediately its rule prohibiting the distribution of union literature by union representatives on its parking lot at its Paris, Texas, plant, and alongside the walkways from the gatehouse to the parking lot and the drive.

(b) Post at its plant at Paris, Texas, copies of the notice attached hereto as an appendix. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent or its representatives, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., JUL 28 1954. (R. 53-55.)

APPENDIX B

The pertinent provisions of the *National Labor Relations Act*, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.), and the text of the *Fifth Amendment to the United States Constitution* are as follows:

NATIONAL LABOR RELATIONS ACT

Section 7

"Sec. 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

Section 8(a) (1) and (2)

"(a) It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sction 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;"

Section 10(e)

"(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States Courts of Appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Apepals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon Writ of Certiorari or certification as provided in Section 1254 of Title 28."

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."